

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFF H. BROOKS

Claimant

VS.

KINCAID COACH LINES, INC.

Respondent

AND

BERKSHIRE HATHAWAY

HOMESTATE INS. CO.

Insurance Carrier

Docket No. 1,067,241

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 6, 2015, Order entered by Administrative Law Judge (ALJ) William G. Belden. Daniel L. Smith of Overland Park, Kansas, appeared for claimant. Stephen P. Doherty of Overland Park, Kansas, appeared for respondent.

The ALJ denied respondent's Application for Dismissal. The ALJ found the Application for Dismissal was prematurely filed and claimant proved a good faith reason for the delay in prosecution.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 5, 2015, Motion to Dismiss Hearing; the transcript of the January 29, 2014, Preliminary Hearing; and the transcript of the July 9, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ erred in determining it cannot bring its motion until one year following the decision of the Board because the one-year period begins from the date of the preliminary order pursuant to K.S.A. 2014 Supp. 44-523(f)(2). Respondent maintains claimant failed to show good cause for the delay in prosecution.

Claimant contends the Board does not have jurisdiction to review an interlocutory order, and thus respondent's appeal should be dismissed. Alternatively, claimant argues the ALJ's Order should be affirmed. Claimant states he has not reached maximum medical improvement, which is a good faith reason for the delay.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent's appeal?
2. If so, did respondent prematurely file its Application for Dismissal?
3. Did claimant show a good faith reason for the delay in prosecution?

FINDINGS OF FACT

On July 11, 2014, the ALJ issued a preliminary Order finding claimant met his burden of proving he sustained a compensable injury by accident on September 7, 2013, but failed to prove he gave proper notice. The ALJ denied the claim for compensation and claimant timely appealed to the Board. In its Order of September 29, 2014, the Board affirmed the ALJ's decision.

Respondent filed an Application for Dismissal with the Division on July 16, 2015. Respondent's reason for seeking dismissal was "a Preliminary Award denying compensability of the claim was entered July 11, 2014. Pursuant to statute, one year from date of Award, an Application for Dismissal for lack of prosecution may be sought."¹

A motion hearing was held on this matter August 5, 2015. Respondent argues K.S.A. 2014 Supp. 44-523(f)(2) indicates the one-year time period begins from the date of a preliminary award, which in this case was July 11, 2014. Further, even if it is determined the one-year period has passed, respondent stated claimant has not produced any additional medical reports in the 10-month period following the Board's September 2014 Order. Respondent noted previous medical reports were in evidence prior to the motion hearing, and claimant had sufficient time to procure additional medical evidence.

Claimant argued respondent's motion was premature because the decision of the Board became the law of the case on September 29, 2014. Claimant explained he was tasked with finding medical treatment on his own, which was difficult due to his injury being work-related. In addition, claimant noted he needed to obtain a medical report addressing permanent impairment before he could request a regular hearing, and he was not yet at maximum medical improvement.

¹ Application for Dismissal filed Jul. 16, 2015.

In a letter to the ALJ dated August 5, 2015, claimant indicated he received a medical report from Dr. Daniel Zimmerman assessing permanent partial impairment as a result of a work-related accident. Claimant requested the matter be set for a prehearing settlement conference.

The ALJ issued his Order on August 6, 2015, and respondent timely appealed.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-523(f)(2) provides:

In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

ANALYSIS

Not every decision of an ALJ is subject to Board review. The Board has authority to review preliminary hearing orders under the circumstances specified in K.S.A. 2013 Supp. 44-534a(a)(2) and K.S.A. 2013 Supp. 44-551(i)(2)(A). K.S.A. 2013 Supp. 44-551(i)(1) grants the Board authority to review “[a]ll final orders, awards, modifications of awards . . . shall be subject to review by the board upon written request by any interested party within 10 days.”

The Order denying respondent's motion to dismiss is neither a preliminary order nor a final order. The ALJ's denial of a motion to dismiss is interlocutory and not subject to review by the Board.² When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³

² See *Walker v. State of Kansas*, No. 1,048,030, 2013 WL 485696 (Kan. WCAB Jan. 25, 2013); *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954 (Kan. WCAB Mar. 14, 2012); *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

³ See *Berumen v. U.S.D. 233*, No. 1,067,401, 2014 WL 6863036 (Kan. WCAB Nov. 4, 2014).

CONCLUSION

Respondent's application for Board review is dismissed for lack of jurisdiction. Accordingly, the merits of the ALJ's August 6, 2015, Order will not be reviewed by the Board at this time.

ORDER

WHEREFORE, the Board finds the respondent's application for Board review of the August 6, 2015, Order of Administrative Law Judge William G. Belden is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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William G. Belden, Administrative Law Judge